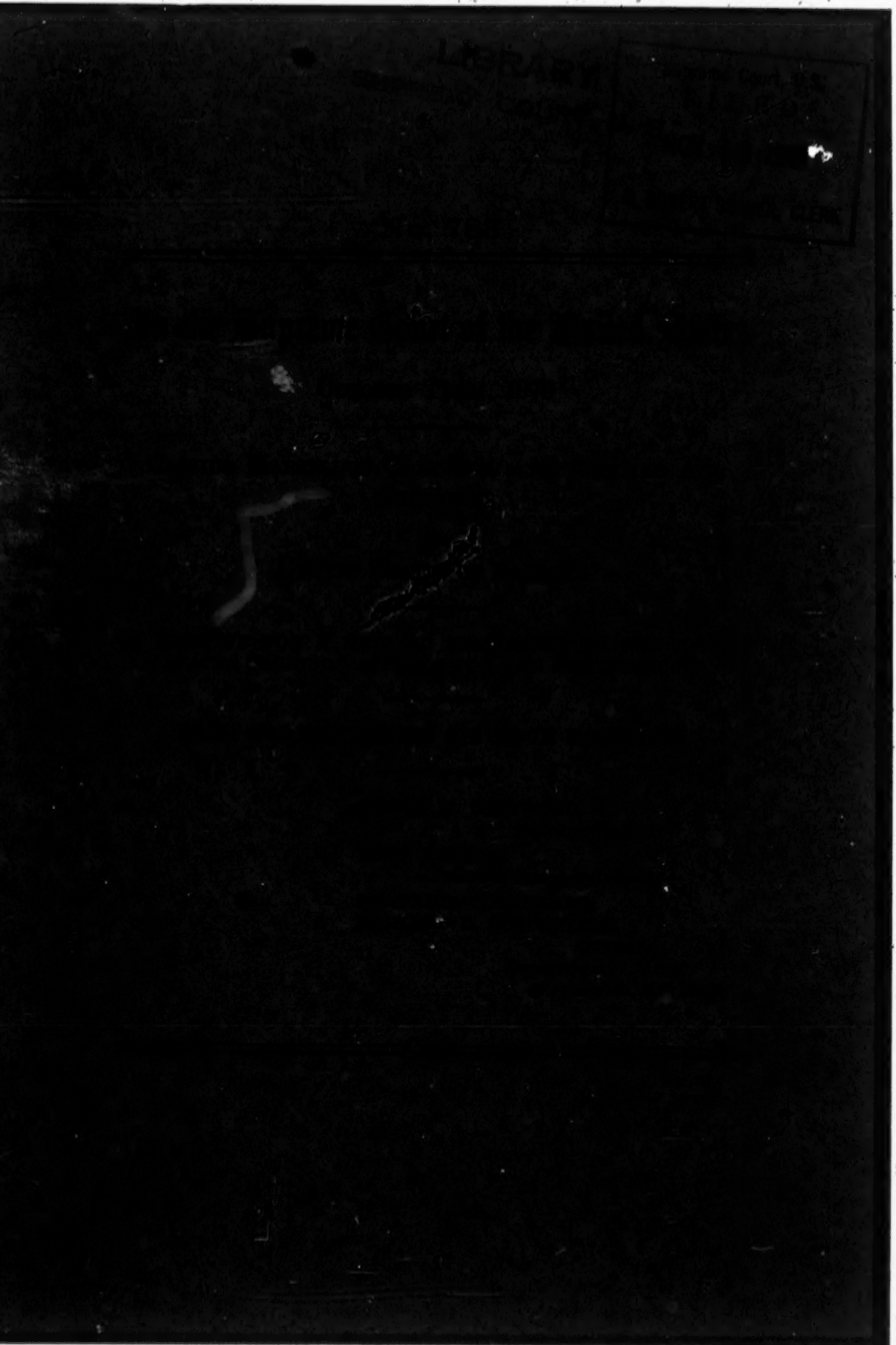

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY a/k/a MUHAMMAD ALI,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is not yet reported. The opinion of the district court (Pet. App. 18a–27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1970, and a petition for rehearing was denied on August 19, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 3, 1970, and the petition was filed on October 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Alderman* v. *United States*, 394 U.S. 165, requires disclosure to petitioner of conversations overheard on an electronic surveillance, conducted solely for foreign intelligence purposes, when an *in camera* inspection by the court reveals that the matter overheard could not conceivably have contributed to the denial of petitioner's claims to draft exempt status or to his conviction for refusal to submit to induction.

2. Whether electronic surveillance, without a warrant, undertaken by the President through the Attorney General for the purpose of gathering foreign intelligence information, contravenes the Fourth Amendment or Section 605 of the Communications Act of 1934.

3. Whether a basis in fact exists for the denial by Selective Service of petitioner's claims for ministerial and conscientious objector classifications.

4. Whether an alleged exclusion of Negroes from local and State appeal boards vitiated petitioner's I–A classification.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of knowingly and willfully refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment and given a $10,000 fine.

Petitioner's conviction was affirmed on appeal; he filed a petition for a writ of certiorari in this Court (No. 271, 1968 Term), seeking further review of the denial of his claims for ministerial and conscientious objector classification as having no basis in fact, and reversal of the conviction due to alleged systematic exclusion of Negroes from membership on the local and State appeal boards which considered his claims. Subsequent to filing its brief in opposition, the government filed a supplemental memorandum advising the Court that petitioner had been overheard on five occasions during electronic surveillances of other persons. This Court then granted the petition, vacated the conviction and remanded the cause to the district court (*sub nom. Giordano* v. *United States,* 394 U.S. 310, 312) for "further proceedings in conformity with *Alderman* v. *United States, Ivanov* v. *United States,* and *Butenko* v. *United States* [394 U.S. 165]." The Court directed (394 U.S. at 312–313) that it would be the duty of the district court to "develop the relevant facts and decide if the Government's electronic surveillance was unlawful" (see *Alderman, Ivanov,* and *Butenko,* 394 U.S. at 170, n. 3), observing that "[o]f course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary" (394 U.S. at 313).

On remand, the government disclosed both to the court and to petitioner the content of four of the five logs in question. The district court concluded that the

information in these logs did not taint petitioner's conviction in any way (Pet. App. 24a).[1]

The government did not turn over the fifth log to petitioner but submitted it to the court for an *in camera* examination. An affidavit by the Attorney General of the United States stated that the log consisted of petitioner's conversation which was overheard in June 1965 by government agents monitoring a wiretap (not directed at petitioner) maintained for the purpose of gathering foreign intelligence information. The affidavit attested that disclosure of the log information other than to the court *in camera* would prejudice the national interest. An accompanying memorandum also submitted for *in camera* inspection, reflected express approval for installation of this surveillance by the then Attorney General of the United States. The district court concluded that the surveillance was lawful and therefore disclosure was not required (Pet. App. 26a).[2]

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[1] The court held that "the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances." (Pet. App. 24a). The court of appeals agreed (Pet. App. 6a), and petitioner has raised no objection in his petition to this portion of the decision below.

[2] The court expressed the view that (Pet. App. 27a):

> * * * in determining whether to employ wiretapping, the President or the Attorney General must make a judgment based on foreign policy considerations. It would not be feasible for the executive to attempt to bring to the court's attention all the factual and policy considerations supporting the decision. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it is ridiculous to place on a United States Commissioner the burden of deciding what is and what is not a threat to national security. * * *

The court of appeals affirmed. After examining *in camera* the fifth log, and reviewing the testimony adduced at the district court hearing, the court below was convinced that the overheard conversation did "not in any manner bear upon the issues involved in [petitioner's] draft law violation case, and in no way [had] this wiretap prejudiced [petitioner], helped build a case against him, or assisted in bringing about his conviction" (Pet. App. 12a). It concluded that petitioner's rights and the national security interest were both properly protected by the *in camera* procedure, and that electronic surveillance for the purpose of gathering foreign intelligence information was not prohibited by the Constitution. The court also held that in enacting 47 U.S.C. 605, Congress did not intend to "limit the President's constitutional prerogative to obtain foreign intelligence information" (Pet. App. 14a).

As to issues petitioner had raised on the first appeal, the court declined to reconsider its earlier opinion. It did, however, consider and reject the argument that this Court's intervening decision in *Welsh* v. *United States*, 398 U.S. 333, affected petitioner's case (Pet. 15a, n.9).

ARGUMENT

1. The authority of the President to use electronic surveillance for the purpose of gathering foreign intelligence information is not directly in issue on this petition. Precisely, the question raised is whether an overheard conversation, which by its nature could not have played a part in the prosecution and which is of

a type that a court sitting *in camera* can readily ascertain to be irrelevant to conviction must, under this Court's ruling in *Alderman* v. *United States,* 394 U.S. 165, be disclosed to petitioner before a judicial finding of irrelevancy may be made.

We find it difficult to conceive that the *Alderman* decision intended imposition of so wooden a requirement as to mandate disclosure in the circumstances of the instant case. In our view, the *Alderman* disclosure requirements are premised on this Court's concern that "the *in camera* procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." *Taglianetti* v. *United States,* 394 U.S. 316, 317. To call for disclosure here of a conversation overheard during a foreign intelligence surveillance—putting the Government to a choice of either disclosure or foregoing its criminal prosecution—would, since a court *in camera* could readily determine that the conversation was not related to the prosecution, unduly extend the scope of the *Alderman* decision. On this record, it cannot reasonably be maintained that " 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court' *Alderman* v. *United States,* * * * [394 U.S.] at 182." *Taglianetti* v. *United States,* 394 U.S. 316, 317. The prosecution was for failure to submit to induction. The only issues on which an electronic surveillance in 1965 could conceivably bear, relate to the genuineness of petitioner's claims to exempt status, either as a minister or as a

conscientious objector. The courts below had no difficulty determining that the overheard conversation did not in any way bear on those issues.[3]

The electronic surveillance questioned here was not the routine surveillance found by *Katz* v. *United States*, 389 U.S. 347, to be constitutionally defective in the absence of a judicial warrant. The wiretap (a nontrespassory wiretap) was maintained for the purpose of gathering foreign intelligence information, under the express authorization of the Attorney General acting, by delegation, for the President.[4] This type of surveillance is fundamentally different from the one involved in *Alderman*. Since the government cannot, in consonance with the national security, disclose the circumstances and content of such surveillances, the

[3] The *in camera* examinations here took place in remand proceedings after the courts below had already heard full argument on the merits. Thus the trial and appellate judges were particularly well suited to determine whether the overheard conversation had a bearing on any issues.

[4] For many years Presidents of the United States have recognized the necessity of electronic surveillance where national security is involved. In 1940, President Roosevelt sent a confidential memorandum to Attorney General Jackson which empowered the Attorney General to authorize the use of wiretapping in matters "involving the defense of the nation." (Pet. 84a). See Rogers, *The Case for Wire Tapping*, 63 Yale L. J. 792, 795, nn. 15, 16 (1954). It has been sanctioned by all Attorneys General since 1940. See Brownell, *The Public Security and Wiretapping*, 39 Cornell L. Q. 195, 199. Petitioner's argument that the Attorney General lacked authorization is specious. President Johnson (the President at the time the surveillance involved here occurred) expressly recognized the necessity of such surveillance where "the national security is at stake." (Pet. 88a).

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government should not be forced to forego prosecution or vacate a valid conviction where, as here, a court can readily ascertain that the conversation overheard has no conceivable relationship to the later criminal prosecution.

2. In any event, disclosure was not required in the instant case because the surveillance was lawful.

a. The Fourth Amendment does not prohibit all searches and seizures; it prohibits only "unreasonable" searches and seizures. In explicating the Amendment's requirements, this Court has never held that a judicial warrant is under all circumstances a precondition to executive action; rather, it has sought to evaluate the feasibility of the warrant requirement in the given circumstances. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42; *Schmerber* v. *California*, 384 U.S. 757; *Warden* v. *Hayden*, 387 U.S. 294; *Terry* v. *Ohio*, 392 U.S. 1; see also *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72, 75–76.[5]

There are overriding interests which militate against imposing the warrant requirements in matters of foreign intelligence. The nature of the decision to employ electronic surveillance to gather foreign intelligence information is such that it falls peculiarly within the area of executive, as distinguished from judicial, com-

[5] See also *Camara* v. *Municipal Court*, 387 U.S. 523, 533, where this Court observed: "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant * * *."

petence. It is therefore the type of decision which should not be subject to prior judicial scrutiny in a warrant proceeding. There can be no doubt that the President has the right and the duty to engage in such intelligence gathering operations as he may believe necessary to the national defense or the conduct of international affairs.[6] This power is not dependent upon any grant of legislative authority from Congress, but rather is an inherent power of the President derived from the Constitution itself. See *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–320; see also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 890; *In re Debs*, 158 U.S. 564; *Tucker* v. *Alexandroff*, 183 U.S. 424, 435. As Chief Justice Marshall observed in *Marbury* v. *Madison*, 1 Cranch 137, 165–166:

> By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. * * *

In *United States* v. *Belmont*, 301 U.S. 324, 328, this Court recognized that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this

[6] In *Totten* v. *United States*, 92 U.S. 105, this Court expressly recognized the President's power to employ agents to gather intelligence information.

political power [is] not subject to judicial inquiry or decision." See also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297; *United States* v. *Pink*, 315 U.S. 203; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *United States* v. *Hogans*, 369 F. 2d 359 (C.A. 2).

It would be neither feasible nor desirable for the Executive to attempt to bring to a court's attention all the factual and policy considerations supporting a decision to employ electronic surveillance to gather foreign intelligence information. Moreover, a judge's experience in assessing "probable cause" in the context of a criminal proceeding would be of little value in determining the reasonableness of such a decision. Indeed, the factors to be considered are akin to those which this Court found to preclude judicial review of the President's award of international airline routes in *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and

> involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. * * *

Petitioner urges this Court to disturb the delicate balance of power between the coordinate branches of government; he urges that the President (through his Attorney General), after assessing the national security need, be required to come into court for an independent judicial evaluation of the threat to national security.[7] Clearly, our federal system does not contemplate that such a determination be made by the courts;[8] it is apparent that they are by design ill-suited to the task.

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[7] If, as we submit, it is constitutionally permissible for the President to authorize electronic surveillance to gather foreign intelligence information, that power was properly delegated to the Attorney General. It is settled that "[e]ach head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority." *Myers* v. *United States*, 272 U.S. 52, 133; *Knauff* v. *Shaughnessy*, 338 U.S. 537. See also *Brownell* v. *Rasmussen*, 235 F. 2d 527 (C.A. D.C.), certiorari dismissed, 355 U.S. 859.

[8] This Court had previously recognized that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509; it "does not withdraw from the Government the power to safeguard its vital interests." *United States* v. *Robel*, 389 U.S. 258, 267.

Katz v. *United States*, 389 U.S. 347, does not preclude our position. There, the Court expressly noted that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." (389 U.S. at 358 n. 23). Indeed, Mr. Justice White in a separate opinion urged courts "not [to] require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable" (389 U.S. at 364, concurring opinion).[9] See also the concurring opinion of Mr. Justice Stewart in *Giordano* v. *United States*, 394 U.S. 310, 313.[10] The courts below correctly resolved that the Fourth Amendment's proscription against unreasonable searches and seizures was not violated where an elec-

[9] While the concurring opinion of Justices Douglas and Brennan (389 U.S. at 359–360) expresses disagreement with the view of Justice White, the disagreement is apparently based on the ground that when investigating *crimes* relating to national security the President and Attorney General are cast in an adversary position. Where, as here, however, electronic surveillance is being maintained not to gather information against potential defendants but solely to gather foreign intelligence information the same reasoning should not apply.

[10] Mr. Justice Stewart noted in his concurring opinion in *Giordano* that the Court had never passed on the legality of electronic surveillance expressly authorized by the Attorney General for the gathering of foreign intelligence information. He suggested that the determination of the legality of such a surveillance might properly be made in the district court in an *in camera* proceeding. See also *Taglianetti* v. *United States*, 394 U.S. 316.

tronic surveillance is aimed at preserving the nation's security.

b. Nor does electronic surveillance authorized by the Attorney General to gather foreign intelligence information violate Section 605 of the Communications Act of 1934. That provision was never intended to restrict the President's authority with regard to intelligence operations deemed essential to the proper exercise of his military and foreign affairs powers. Congress has, since 1940, repeatedly been advised that the Department of Justice did not interpret Section 605 as prohibiting government interception of telephone conversations for merely investigative purposes and that the Department was employing such wiretaps. See Letter of Attorney General Jackson to the Chairman of the Judiciary Committee of the House of Representatives, dated February 10, 1941, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 2266 and H.R. 3099, 77th Cong., 1st Sess., pp. 16–18; Letter of Attorney General Rogers to the Chairman of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, dated September 10, 1959, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., p. 1037; Statement of Attorney General Kennedy, Hearings Before the Committee on the Judiciary, United States Senate, on S. 2813 and S. 1495, 87th Cong., 2d Sess., pp. 11–12. Congress has taken no action to indicate disagreement with this construction. Indeed, in 1968, when Congress specifically addressed its attention to the effect of Section 605 on the President's power to

gather intelligence information through wiretaps, it agreed with the Department's long-standing construction. The Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2511(3)), 82 Stat. 197, 214, provides:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

In enacting this provision, Congress recognized that the considerations warranting the application of Section 605 to normal criminal investigations were not germane to investigations aimed only at gathering foreign intelligence information. The Senate Report stated (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 69):

> It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.

3. There is no merit to petitioner's argument that this Court's decision last term in *Welsh* v. *United States,* 398 U.S. 333, requires a reversal of his conviction. As we understand that decision, it does not, as petitioner contends, read out of the exemption provision (50 U.S.C. App. 456(j)) the requirement that a conscientious objection to war must be founded on "religious training and belief." 398 U.S. at 338–340. A registrant is still denied exempt status if his objection "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 342–343). The statutory exemption applies to persons who on moral and ethical grounds conclude it is wrong to kill a fellow human being in war; it does not extend to those who as a matter of conscience conclude on racial grounds that it is wrong to fight on behalf of white men who are viewed as oppressors.

In any event, there is ample evidence in this record to sustain the board's conclusion that petitioner's political objection runs only to specific wars rather than to war in general. (See our brief in opposition to the first petition for certiorari, No. 271, O.T. 1968, pp. 7–9). As we argue in our brief in *Gillette* v. *United States,* No. 85, O.T. 1970 and *Negre* v. *Larsen,* No. 325, O.T. 1970, presently before this Court on writs of certiorari, Congress had a valid basis for drafting legislation to excuse from combatant training and service only the conscientious objector to war in any form. This is a proper exercise of the power, expressly granted Congress in the Constitution, to raise and support armies.

4. Petitioner again tenders to the Court the issues raised in his first petition for a writ of certiorari—whether a basis in fact existed for the denial of his ministerial and conscientious objector claims and whether an alleged systematic exclusion of Negroes from the local board and the first appeal board to consider his claims vitiated the classification. Those issues have been fully treated in our brief in opposition to the earlier petition (No. 271, O.T. 1968) upon which we rely here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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